No. 84-1905

In The

Supreme Court of the United States

October Term, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

v.

BUENTA M. OWENS, ET AL.,

Appellees.

On Appeal From The United States District Court For The Central District Of California

BRIEF FOR THE APPELLEES

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QUESTIONS PRESENTED

Under the Social Security Act, both widowed spouses and surviving divorced spouses were entitled to survivor's benefits based on the work records of the deceased wage earners, but, in the event of remarriage, the Act treated the two classifications of surviving spouses differently. The questions thus presented are:

1. Whether the district court correctly held that the Social Security Act's prohibition against the payment of benefits to surviving divorced spouses who remarried at age 60 or over, while widowed spouses were eligible without regard to remarriage at age 60 or over, violates the equal protection component of the due process clause of the Fifth Amendment.

2. Whether the district court properly certified a nationwide class by recognizing that, since the undisputed sole issue on the merits was the constitutionality of the statutory scheme, the class could include applicants who did not exhaust administrative remedies or seek judicial review within sixty days prior to the filing of this lawsuit.

PARTIES TO THE PROCEEDINGS

Since the filing of the Brief for the Appellant, Margaret M. Heckler has been replaced by Otis R. Bowen. He is now Secretary of Health and Human Services and the appellant in this matter.

The appellees are correctly named in the Brief for the Appellant.

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BRIEF FOR THE APPELLEES

STATEMENT OF THE CASE

A. STATUTORY AND REGULATORY FRAMEWORK

1. Substantive provisions

a. Benefits for divorced spouses: In 1939, Congress amended the Social Security Act to authorize benefits for individuals other than wage earners themselves. At that time, these "secondary" benefits were made available to wives, dependent children, widows, and surviving dependent parents. Ch. 666, §201, 53 Stat. 1364-1366. Congress later extended secondary benefits to dependent husbands

and widowers as well. Ch. 809, §101(a), 64 Stat. 483, 485 (1950).[1]

Also in 1950, Congress created a category of secondary beneficiaries defined as "former wife divorced". Ch. 809, §104(a), 64 Stat. 511. The definition required a woman to be the mother of a deceased wage earner's child. Like widows in that situation, a "former wife divorced" was eligible for "mother's benefits" if she had not remarried and if she was dependent on the wage earner. Ch. 809, §101(a), 64 Stat. 485-486 (1950). By this addition, Congress was carrying out its "intention of paying benefits to individuals who have actually been dependent upon a deceased worker. . . ." S.Rep. No. 1669, 81st Cong., 2d Sess. (1950), reprinted in [1950] U.S. Code Cong. & Admin. News 3317.

In 1965, benefits were authorized for divorced wives and widows who could prove dependency on the wage earner. Pub. L. No. 89-97, §§308(a), 308(b)(1), 79 Stat. 375-377. A "divorced wife" and "surviving divorced wife" were defined as a woman "who had been married to the [wage earner] for a period of 20 years immediately before the date the divorce became effective." Pub. L. No.

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[1]As the Secretary's brief sets out, Congress often excluded men from some secondary benefits, or imposed eligibility conditions on them to which women were not subject. These unconstitutional provisions have generally been corrected as the result of decisions by this Court. The statutes at issue in this case do not expressly discriminate on the basis of gender. Because the great majority of survivors harmed by the challenged scheme are female, however, see *infra*, at 20 n.8, this discussion will focus primarily on benefits available to women. References in this brief which are not gender-neutral reflect only the reality of the challenged scheme's overwhelmingly greater impact on women.

89-97, §308(c), 79 Stat. 377. These benefits were in recognition of the fact that, although the divorced wife "had been dependent upon the worker for much of his working lifetime," marriages often "end in divorce after many years, when the wife is too old to build up a substantial social security earnings record even if she can find a job." S.Rep. No. 404, 89th Cong., 1st Sess. (1965), reprinted in [1965] U.S.Code Cong. & Admin. News 2047. Remarriage terminated entitlement, except where the marriage was to a man receiving certain secondary benefits. Pub. L. No. 89-97, §308(a), 79 Stat. 375-376.

The requirement that divorced wives and widows demonstrate actual dependency was eliminated seven years later. Pub. L. No. 92-603, §§114(a), (b), 86 Stat. 1348 (1972). Congress took this step because "the support requirements of the law have operated to deprive some divorced women of the protection they should have received." H.Rep. No. 92-231, 92d Cong., 1st Sess. (1971), reprinted in [1972] U.S.Code Cong. & Admin. News 5041.

In 1977, Congress changed the definition of divorced spouses by reducing the required duration of the marriage. It was disturbed that the twenty-year rule deprived many deserving divorced people of "any Social Security protection." H.Rep. No. 95-702, Part I, 95th Cong., 1st Sess. 48 (1977). The new definition required ten years of marriage. Pub. L. No. 95-216, §337, 91 Stat. 1548.

b. Remarriage rule: Originally, entitlement to secondary benefits terminated on marriage, §202(e) (1) (A) of the Act, 53 Stat. 1365 (1939); §202(f) (1) (A), 64 Stat. 485 (1950), but, in 1958, Congress determined that widows and widowers who remarried certain other secondary beneficiaries would not forfeit their survivor's benefits. Pub.

L. No. 85-840, §§307(b), (e), 72 Stat. 1031. The exception was intended to "eliminate the hardship" caused by the general rule. S.Rep. No. 2388, 85th Cong., 2d Sess. (1958), reprinted in [1958] U.S. Code Cong. & Admin. News 4233.

In 1965, Congress allowed widows and widowers 50% of the wage earner's benefit when they remarried someone other than another secondary beneficiary. Pub. L. No. 89-97, §§333(a) (1), (b) (1), 79 Stat. 403, 404. This change was premised on the legislative judgment that the old rule had "an undesirable result in that widows (and widowers) who would like to remarry do not do so because if they did they would lose their social security benefits." S.Rep. No. 404, *supra*, reprinted in [1965] U.S.Code Cong & Admin. News 2049; see also *id.* at 1958.

Concern about the harsh effects of the remarriage rule resurfaced in 1977 when Congress observed that it was causing some beneficiaries to lose all or part of their entitlement if they remarried. The House Ways and Means Committee was "especially concerned about the effect of these provisions on older surviving spouses (and divorced spouses)." H.Rep. No. 95-702, Part I, *supra*, at 48. It therefore recommended that the remarriage rule be eliminated for selected categories, so that remarriage would not affect entitlement for either widows or surviving divorced widows. *Ibid.* The Senate disagreed with the resulting House bill, however and the conference committee, without explanation, adopted a compromise—elimination of the remarriage penalty only for widows and widowers. H. Conf. Rep. No. 95-837, 95th Cong., 1st Sess. 73 (1977). Accordingly, effective January 1, 1979, widows and widowers maintained their survivor's benefits if they remarried at age 60 or over. Pub. L. No. 95-216, §§336(a) (3), (b) (3), 91 Stat. 1547, amending §§202(e) (4) and (f) (5) of the Act.

In 1983, after this action was filed, Congress eliminated the remarriage rule for divorced spouses. Therefore, as of January 1, 1984, surviving divorced spouses remained entitled to survivor's benefits if they remarried at age 60 or over. Pub. L. No. 98-21, §§131(a) (2), (a) (3) (A), (b) (2), (b) (3) (A), (d) (1), 97 Stat. 92, 93.

2. **Procedural provisions**

Pursuant to 42 U.S.C. §§405(a), (b), the Secretary has created an administrative procedure for reviewing benefit claims under the Social Security Act. This often protracted process consists of four steps: an "initial determination", a paper review called "reconsideration", a hearing before an administrative law judge, and a final discretionary review by the "Appeals Council". 20 C.F.R. §§404.900 - 404.983. After a decision at one level, the claimant has sixty days in which to seek review at the next step. Following a "final decision" by the Secretary, the claimant is authorized by 42 U.S.C. §405(g) to obtain review in federal court. This can be done individually or on behalf of a class.

In the usual case involving application of the Act to an individual fact pattern, the final decision follows exhaustion of the administrative process, and the appeal must be filed in federal court within sixty days of that decision. In specified circumstances, however, completion of the lengthy administrative process has been held to be pointless, wasteful, or even harmful, and adherence to the exhaustion and 60-day requirements has not been required.

The Secretary waives exhaustion by recognizing that he cannot or will not resolve an issue critical to the bene-

ficiary's claim. An expedited procedure for constitutional claims, the prototype of this situation, is set out in the regulations. 20 C.F.R. §§404.923-404.928. The courts may also find that exhaustion is inappropriate. Factors bearing on this decision include the degree to which the critical contentions are collateral to issues raised in routine claims and the potential harm to the claimant which may result from requiring completion of the administrative process.

Similarly, strict application of the 60-day statute of limitations may be determined inappropriate. This occurs in the same circumstances and for the same reasons that exhaustion of administrative remedies is waived, and comports with the equitable exceptions applicable to all statutes of limitations.

B. PROCEEDINGS IN THIS CASE

1. The administrative process

a. Buenta Owens married Russell Judd in 1937; after nearly thirty-one years of marriage, they were divorced. Russell Judd later died, and, when she was 61, Buenta Owens was remarried, to Kenneth Owens. J.S. App. 31a.

On July 30, 1982, she applied for benefits as the surviving divorced wife of Russell Judd. Her claim was denied on August 27, 1982 because she was married. On October 19, 1982 she sought reconsideration of that decision on the ground that the differential treatment of widows and divorced widows was unconstitutional, and expressly requested that the expedited review process for constitutional claims be employed. In its Reconsideration Determination of December 7, 1982, the Social Security

Administration (SSA) ignored the constitutional argument, and determined that it had properly followed the statute by denying the claim because of her marriage to Kenneth Owens. B.R. 7, 9-10.

Two months later, SSA sent Mrs. Owens a short document entitled "Agreement". By its terms, Mrs. Owens and the Secretary agreed that the only disputed issue was the constitutionality of 42 U.S.C. §§ 402(e)(1)(A), (4), and that, but for those provisions, "the right of the claimant to benefits has been established by the claimant." The agreement also acted as "a waiver by the claimant and the Secretary of the necessity to pursue the remaining steps of the administrative appeals process." Mrs. Owens signed it on February 11, 1983, and a representative of the Secretary signed on March 3, 1983. J.S. App. 32a, 50a-51a; B.R. 2-3.

On April 19, 1983, she filed this action in the Central District of California, contending that the challenged statutory scheme was violative of the guarantees of equal protection and seeking to represent a nationwide class of similarly situated surviving divorced spouses. J.S. App. 14a-15a.

b. Kenneth Owens was married to Dorothy Owens for over thirty-four years, divorcing in 1978. Dorothy Owens later died. At the age of sixty, Kenneth Owens married Buenta Owens. J.S. App. 32a.

On July 15, 1982, Mr. Owens filed an application for survivor's benefits on the wage record of his deceased former wife. Five months later, his claim was denied, due to his remarriage. On February 11, 1983, he sought reconsideration on the ground that the statutory scheme

was unconstitutional; he also requested the expedited administrative process. Three months later, his reconsideration request was denied. Although SSA acknowledged that a request for an expedited appeal had been received, he was informed that he would again be required to "file a written request" to avail himself of that route. That request was made immediately, on May 18, 1983. J.S. App. 32a; K.R. 12-18, 28-29.

Nearly five months later, in October, 1983, Mr. Owens received his "Agreement", which substantially duplicated Mrs. Owens'. He signed and returned it, and, on November 23, 1983, over nine months after his request for expedited review, the agreement was signed by a representative of the Secretary. J.S. App. 32a, 52a-53a; K.R. 1, 4-5.

His lawsuit, virtually identical to his wife's, was filed in the Central District of California on January 6, 1984, and was later consolidated with her case. J.S. App. 15a.

2. **The merits**

On December 23, 1983, before Mr. Owens' complaint was filed, the district court ruled in the Secretary's favor. Applying the rational basis test, the court rejected the Secretary's reliance on *Mathews v. de Castro*, 429 U.S. 181 (1976), as that case dealt only with the issue of dependency during the lifetime of the wage earner. J.S. App. 9a. Judge Byrne recognized that the analysis must focus on remarriage:

> "In order [for the Secretary] to prevail on an assertion of varying dependence, the Court must find logical reasons why surviving divorced spouses *on remarriage* are less dependent upon a now deceased primary wage earner than are widows *on remarriage*."

Id. at 10a (emphasis in original). Although he could find "[n]o tenable basis for such a distinction" (*ibid.*), he upheld the scheme on the ground that Congress was always free to move one step at a time, without regard to the irrationality of the step which it took. *Id.* at 10a-11a.

Mrs. Owens moved for reconsideration under Rule 59, and Mr. Owens moved for summary judgment. In a new decision dated October 5, 1984, the district judge acknowledged his error, noting that "Congress must have a rational basis for each step it takes." *Id.* at 40a. He reviewed the disparate treatment of the two classifications, and found no basis for Congress to assume

> "that, on remarriage, surviving divorced spouses become less dependent than widows. . . . Whatever dependency differences might exist between widowed spouses and surviving divorced spouses upon the death of the wage earner, those differences would likely be erased by marriage."

Id. at 42a. Accordingly, the district court entered judgment on December 26, 1984, declaring the challenged provisions unconstitutional and enjoining their continued application to the appellee class. *Id.* at 44a-46a.

3. Class certification

On August 28, 1984, prior to ruling on Mrs. Owens' Rule 59 motion, the district judge granted the motion for class certification. *Id.* at 13a-28a. He rejected most of the Secretary's contentions that 42 U.S.C. § 405(g) should strictly limit the size of the class. See J.S. App. 15a-23a. In particular, he determined that, since neither the facts nor the Secretary's interpretation of the statute were in dispute, and since the Secretary's regulations expressly provided for waiver of exhaustion in that circumstance,

the Secretary had waived exhaustion. *Id.* at 17a-18a. Furthermore, because the only issue on the merits was the constitutionality of the challenged provisions, the court held that it should exercise its authority to waive exhaustion. *Id.* at 18a-19a.

Judge Byrne also concluded that the 60-day statute of limitations was tolled by the filing of Buenta Owens' request for reconsideration of the initial administrative decision. That action gave the Secretary "adequate notice of the nature of the claim and opportunity to evaluate the effects of the claim on all similarly situated persons." *Id.* at 22a. The district court thus defined the class to include all those who had live claims on or after August 20, 1982, which was sixty days prior to the request for reconsideration. See *id.* at 44a.

SUMMARY OF ARGUMENT

I. A. For several reasons, the disparate treatment of divorced and non-divorced widows upon remarriage should be analyzed under a standard of review more demanding than the rational basis test. First, the rationales offered by the Secretary are the products of government attorneys, not of legislative reasoning. See *Schweiker v. Wilson*, 450 U.S. 221, 244-245 (1981) (Powell, J., dissenting). Secondly, these rationales are based on policy considerations, not concerns for the fiscal soundness of the program; accordingly, the low level of scrutiny employed in *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), is not appropriate. *Jimenez v. Weinberger*, 417 U.S. 628, 634 (1974). Thirdly, the classificatory distinction is based on divorce, suggesting that Congress was unthinkingly re-

flecting a tradition of disfavor rather than engaging in reasoned analysis. In the main, this disfavor is rooted in society's historical disapproval of divorced women, who are the overwhelming victims of the classificatory scheme.

B. Congress has at all times premised survivor's benefits on assumptions of probable dependency. For the same reason, it also authorized benefits for divorced women. Furthermore, Congress clearly expressed the judgment that survivors should not be penalized and discouraged from remarrying by the denial of survivor's benefits. In light of these goals, and the legislative recognition that both divorced and non-divorced widows were dependent at the death of the wage earner, the Secretary must explain what significant (yet never articulated) difference Congress relied upon to rationalize disparate treatment of divorced and non-divorced widows at remarriage.

The Secretary cites *Califano v. Jobst*, 434 U.S. 47 (1977) and *Mathews v. de Castro*, 429 U.S. 181 (1976) as validating all distinctions involving marriage and divorce. But the holdings in those cases do not control this situation, which is concerned with discrimination amongst those who marry, and with survivor's benefits, not wife's benefits.

C. Contrary to the Secretary's contention, the district judge did not misunderstand the statutory scheme. He correctly recognized that, in the context of the categories which Congress defined as entitled, there was no basis for distinguishing between the two groups of surviving spouses on the basis of remarriage, a factor unrelated to the acknowledged premise for their entitlement, dependency. Prior discrimination against divorced wid-

ows and differences in categorical definitions are not relevant to the issue posed by the disparate treatment of two classifications for which Congress had previously discerned an equivalence in dependency.

The challenged scheme cannot be upheld solely on the ground that Congress may move one step at a time; there must be a valid rationale for whatever step is taken. Nor is there any basis for contending that Congress distinguished between the classifications out of fiscal concerns. In Social Security terms, the amount at issue was minuscule, and the Court should reject contentions of that nature when there is no supporting evidence.

The Secretary does not explain why widows have a greater stake in survivor's benefits after remarriage than do divorced spouses. This hypothesis is contradicted by the recognized dependency of both groups on the wage earner at death, and no logic suggests a differential change in dependency upon remarriage.

The Secretary's attempt to rationalize the discrimination as paralleling the effect of remarriage on alimony is misplaced. The distinction in this case is between survivors of wage earners, so that principles drawn from contexts involving a living wage earner are meaningless. At bottom, the Secretary's rationale is nothing more than the perpetuation of stereotyped images of widowed and divorced women, with one rewarded for her behavior and the other penalized. In any event, even if some minor distinction between the classifications were imaginable, it could not provide a sufficient basis to undercut the legislative determination that survivors should be encouraged to remarry.

The Secretary's after-the-fact rationales, with no supporting legislative history, are inadequate explanations, for they contradict the clearly expressed Congressional recognition of the dependency of surviving widows (divorced and non-divorced) and the equally explicit policy judgment that survivors should not be discouraged from remarrying.

II. A. This Court has always analyzed the Secretary's actions to ascertain his true position on exhaustion of administrative remedies in constitutional challenges. In three cases, the Court concluded that the Secretary had waived exhaustion by conceding, in various informal ways, that the challenged statute required denial of the claim.

The Secretary's formal waiver of exhaustion for the named plaintiffs in this case was a more comprehensive recognition of the Secretary's incompetence to provide relief, and certainly no less a concession. Since all class members would have been eligible for benefits except for the challenged statute, the concession logically applied to them as well. The district court thus correctly effectuated this Court's "practical" approach to exhaustion by interpreting the Secretary's actions as a waiver.

The district judge's alternative analysis, waiving exhaustion himself, was also correct, as the Secretary was incapable of providing relief to the class members.

B. Relying on this Court's explicit holdings, the district court concluded that the 60-day provision in 42 U.S.C. § 405(g) was a statute of limitations, subject to tolling. The Secretary, however, contends that only those satisfying the rule's literal terms may be included within the class. But this Court has previously recognized that neither the venue nor the exhaustion rules of § 405(g) are

to be interpreted literally. Furthermore, this Court has refused to read § 405(g) literally to preclude class relief and injunctive relief, and has construed it broadly to cover constitutional challenges as well as routine cases. The district court's interpretation of § 405(g) also comports with the language of the provision itself, which reflects an intended flexibility by permitting extensions of the 60-day period.

The district court's analysis follows general pronouncements that limitations periods should be analyzed in light of the legislative purposes behind the given statutory scheme. This Court has thus refused to apply a literal interpretation of a limitations period in the remedial context of Title VII, expressly recognizing the propriety of waiver and tolling. In applying a similar analysis to another remedial statute, the Court noted that the limitations period was not intended to "shield" the government.

The remedial purposes of the Social Security Act and beneficiaries' understandable difficulties in comprehending their rights under the Act, especially where constitutional claims are involved, militate in favor of similar flexibility in this situation. To reject these practical approaches will render class certification nearly impossible in Social Security cases, thus preventing claimants with legitimate grievances from obtaining relief from constitutional violations.

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ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT NO TENABLE BASIS EXISTS FOR DISTINGUISHING UPON REMARRIAGE BETWEEN SURVIVING SPOUSES AND SURVIVING DIVORCED SPOUSES

A. In the circumstances of this case, the Court should carefully scrutinize the Secretary's purported rationales

Under the rational basis test, "the classificatory scheme chosen by Congress [must] rationally advance[] a reasonable and identifiable governmental objective...." *Schweiker v. Wilson*, 450 U.S. 221, 235 (1981); see also, *e.g., Hooper v. Bernalillo County Assessor*, 105 S.Ct. 2862, 2866 (1985).[2] The test is "not a toothless one", *Mathews v. Lucas*, 427 U.S. 495, 510 (1976), and, accordingly, the Court has invalidated various discriminatory classifications.[3]

In this case, the district court applied the rational basis test, and found the challenged scheme incapable of satis-

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[2]The precise contours and proper application of the test have been the subject of considerable disagreement. See, *e.g., U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 176 n. 10 (1980) (noting inconsistent applications of the test); *City of Cleburne, Tex. v. Cleburne Living Center*, 105 S.Ct. 3249, 3261 (1985) (Stevens, J., concurring) (suggesting that the various levels of review are, in fact, "a continuum of judgmental responses"); *id.* at 3265 (Marshall, J., concurring in part, dissenting in part) (terming majority's application of the test precedent which will "subject economic and commercial classifications to similar 'ordinary' rational basis review. . . .")

[3]*E.g., Hooper v. Bernalillo County Assessor, supra; Williams v. Vermont*, 105 S.Ct. 2465 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438, 443 (1982) (Blackmun, J., separate plurality opinion) (Powell, J., concurring in the judgment).

fying that level of scrutiny. J.S.App. 38a-42a. The Secretary urges this Court also to employ the rational basis analysis, but to rule that the classification passes that test. Brief for the Appellant (hereinafter, "See.Br.") 21. Appellees agree with the district court that no rationale supports the classificatory scheme under the rational basis test, but there are several reasons for employing a more demanding review of the Secretary's contentions.

First, as the standard articulated in *Wilson* indicates, the legislature's objective must be both "reasonable and identifiable." That latter requirement is a crucial aspect of the inquiry:

> "'[W]e must discover a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislator.'"

City of Cleburne, Tex. v. Cleburne Living Center, 105 S.Ct. 3249, 3261 n.4 (1985) (Stevens, J., concurring) (citation omitted).[4] In this case, no reason for the distinction is apparent from the legislative history. See *supra*, at 4. The Secretary—or, rather, his attorneys—have therefore been left to devise rationales after the fact. But these speculations, without more, do not provide a sufficient basis on which to presume legislative motivation; there must be some plausible connection to the Congressional action. The Court must therefore look carefully at the

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[4]See also, e.g., *Wilson*, 450 U.S. at 243-244 (Powell, J., dissenting) ("an important touchstone for equal protection review of statutes is how readily a policy can be discerned which the legislature intended to serve"); *id.* at 244 n. 6; *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 & n. 16 (1975).

government's suggested rationales to determine whether they may have reasonably motivated the legislature.

In *Wilson*, the four-Justice minority, faced with a similarly empty slate from which to devine legislative intent, expressly suggested a more rigorous review in situations of this type:

> "[T]he Court should receive with some skepticism *post hoc* hypotheses about legislative purpose, unsupported by the legislative history. When no indication of legislative purpose appears other than the current position of the Secretary, the Court should require that the classification bear a 'fair and substantial relation' to the asserted purpose. . . . This marginally more demanding scrutiny indirectly would test the plausibility of the tendered purpose, and preserve equal protection review as something more than 'a mere tautological recognition of the fact that Congress did what it intended to do.'"

450 U.S. at 244-245 (Powell, J., dissenting) (footnote and citations omitted).[5] In this instance, where the Secretary's attorneys have concocted a spate of rationales at the district and appellate levels in an effort to support the discriminatory scheme, the approach suggested by the *Wilson* minority is particularly appropriate. There will be no interference with the legislative process, for the Court's review is not of Congressional goals, but only of "the ingenuity of a government lawyer." *Id.*, at 244 (Powell, J., dissenting).

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[5]See also *Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662, 682 n.3 (1981) (Brennan, J., concurring in judgment); *Jimenez v. Weinberger*, 417 U.S. 628, 633 (1974) (rejecting suggested rationale on ground that there is "no evidence" to support it).

A second reason to test the scheme by reference to a more careful scrutiny lies in the nature of the arguments offered by the government. In circumstances where a program's fiscal solvency is the motivating factor in the distribution of benefits, this Court has applied the lowest level of review. See, *e.g.*, *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 175-177 (1980); *Jefferson v. Hackney*, 406 U.S. 535, 549 (1972); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). But, where the purpose is not "to achieve a necessary allocation of finite resources, . . . *Dandridge* is distinguishable and not controlling." *Jimenez v. Weinberger*, 417 U.S. 628, 634 (1974).

In this case, the government relies on policy, not fiscal, arguments.[6] There is no indication that Congress excluded divorced widows from the exception to the remarriage rule in order to protect finite resources. Accordingly, application of the minimal scrutiny employed to review the classifications in *Dandridge* is no more appropriate here than in *Jimenez*.

The third reason for a more demanding review inheres in the definitive characteristics of the disfavored class. The characteristic which both distinguishes the disfavored from the favored, and also purports to justify the differential treatment, is divorce. The Secretary's arguments are all premised on an assumption that it is

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[6]The Secretary does briefly suggest that Congress may have been motivated by fiscal concerns when it declined to eliminate the remarriage rule for divorced widows as well. Sec. Br. 29, 31. The evidence (see *infra*, at 28-29) demonstrates, however, that the amount at stake was so minimal that it could not reasonably be viewed as the motivating factor. *Jimenez v. Weinberger*, *supra*, 417 U.S. at 633.

permissible to treat divorced people as less deserving than those who remain married.[7] While there may be valid reasons, in some contexts, to favor individuals who remain married over those who do not, the analysis in each instance must be undertaken with a recognition of society's historically negative view of those who divorce. See, *e.g.*, Lenore Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America*, at xvii (1985). Justice Stevens' recent admonition is particularly apt in this instance, where a characteristic has been regularly cited as the basis for disparate treatment:

> "The Court must be especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a 'tradition of disfavor [for] a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification.'"

City of Cleburne, 105 S.Ct. at 3261 n. 6 (citation omitted).

The assumption that divorced people are less deserving is undoubtedly grounded in the traditional view of divorced women in particular. The term "divorcee" is now out of vogue, but society's perception of women throughout this nation's history indicates that "part of the 'baggage of sexual stereotypes'. . . ." (*California v. Westcott*, 443 U.S. 76, 89 (1979) (citation omitted)) is the double standard applied to women who divorce. Indeed, as will be discussed *infra*, at 31, one of the Secretary's rationales for this discrimination is merely a camouflaged version

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[7] "Congress obviously concluded that widows and widowers were the most deserving of receiving benefits after remarriage. . . ." Sec.Br. 29.

of the offensive and archaic notion that divorced women are less worthy individuals. See William Goode, *After Divorce* 182-184, 246 (1956).[5]

Justice Stevens' concern that "[h]abit, rather than analysis" (*City of Cleburne*, 105 S.Ct. at 3261 n. 6) may inform legislative decisions is of special importance in this case, where the written record is blank as to Congress' actual intentions. It suggests the prototypical instance in which a legislature, traditionally inclined to favor one classification over another, acquiesces in a common assumption without acknowledging the significance of its collective act.

The classificatory scheme at issue is not the inevitable result of drawing a line which must be drawn. See, *e.g.*, *Fritz*, 449 U.S. at 179. Here, the line was the product of a political compromise, drawn expressly to disfavor divorced people. Whatever the political value of compromise, the guarantees of equal protection must ensure that the deal which is struck is not irrational. The Court should therefore carefully consider whether, in the context of *this* program, the "tradition of disfavor" provides a legitimate, rather than an habitual, basis for discriminatory treatment.

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[5]That the discrimination overwhelmingly affects women is documented by SSA statistics which show the numbers of women and men receiving surviving spouse's benefits, and, thus, by extrapolation, indicate the distribution by gender of divorced surviving spouse's benefits. In the 1983-1984 period, of the just over 1,000,000 new widow/widower beneficiaries, only 3.5% were men. Social Security Administration, *Social Security Bulletin, Annual Statistical Supplement, 1984-85*, Table 57, p. 122.

B. Prior decisions of this Court do not validate the scheme in this case, which runs counter to the purposes of survivor's benefits, of benefits for divorced spouses, and of continuing benefits after remarriage

1. In *de Castro*, this Court stated that "the primary objective [of the Social Security system] was to provide workers and their families with basic protection against hardships created by the loss of earnings due to illness or old age." 429 U.S. at 185-186 (footnote omitted). For secondary benefits, dependence was the key for carrying out this objective: "[T]he general scheme of OASDI shows that dependence on the covered wage earner is the critical factor in determining beneficiary categories." *Califano v. Goldfarb*, 430 U.S. 199, 213 (1977) (plurality opinion) (footnote omitted). Individualized determinations were rejected in favor of using "simple criteria . . . to determine probable dependency." *Califano v. Jobst*, 434 U.S. 47, 52 (1977) (footnote omitted); see also, *e.g.*, *Mathews v. Lucas*, *supra*, 427 U.S. at 508-509.[9]

In particular, this approach was applied to surviving spouses; assumptions of dependency were the benchmark of their entitlement. *Califano v. Boles*, 443 U.S. 282, 289 (1979); *Goldfarb*, 430 U.S. at 214. Similarly, dependence on the wage earner also was the crucial factor in the allocation of benefits to divorced women. Indeed, originally, divorced women had to demonstrate actual dependency, but this requirement was eliminated in 1972. See *supra*, at 3. Congress was concerned that the proof-of-support require-

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[9]In making dependency the critical component for entitlement, Congress rejected need as a relevant consideration. *de Castro*, 429 U.S. at 186-187; *Goldfarb*, 430 U.S. at 213 & n.11.

ment was preventing deserving divorced women from receiving benefits, see, *e.g.*, S.Rep. No. 92-1230, 92d Cong., 2d Sess. 142 (1972), as this Court has observed. *Boles*, 443 U.S. at 291. In short, as with all survivors, divorced surviving spouses were recognized as probably dependent on the wage earner and therefore entitled to survivor's benefits.

The legislative purpose in continuing benefits to survivors who remarry has also been clearly expressed; it was an effort to eliminate the "undesirable result" of discouraging survivors from remarrying. S.Rep. No. 404, *supra*, reprinted in [1965] U.S.Code Cong. & Admin. News 2049; see also H.Rep. No. 95-702, Part I, *supra*, at 48. Ultimately, Congress eliminated this "penalty" for everyone, including the divorced. H.Rep. No. 98-25, 98th Cong., 1st Sess. 34 (1983).

Congress thus determined that widows and divorced widows were entitled to survivor's benefits due to their equivalent dependence on the wage earner. In light of that legislative recognition, it is questionable whether *any* other event could suffice to distinguish between the two classifications. But remarriage is a particularly inapt factor on which to premise differential treatment. The logic of eliminating the punishment for remarrying is no less applicable to the divorced survivor than to the non-divorced survivor.

For the Secretary to prevail, therefore, Congress must have reasonably determined both that the dependence of a divorced survivor was more likely to terminate at remarriage than would that of a widow and also that that eventuality provided a sufficient rationale to penalize only divorced widows for remarrying. As the district judge

observed, however, the Secretary "has been unable to present a logical basis for this distinction. . . ." J.S. App. 42a.

2. The Secretary ignores the specifics of this case, devoting his attention instead to general statements about marriage and divorce which bear little relevance to the classificatory scheme at issue. This Court's recognition that divorce and marriage can each work changes in an individual's relationship with others does not, as the Secretary would have it, provide an automatic basis for distinguishing between widows and divorced widows in every context.

As he did below, the Secretary cites *Jobst* and *de Castro* as determinative of the issue. Sec.Br. 22-24. In the former, this Court approved of "the assumption that a married person is less likely to be dependent on his parents for support than one who is unmarried." 434 U.S. at 53. From this holding, the Secretary infers legitimacy for any rule, involving any classification of beneficiary, which distinguishes on the basis of marriage. Sec.Br. 23.

But the *Jobst* holding has no reference to the effect of remarriage on a surviving spouse; it describes only the presumed result from the marriage of a dependent child. More important, the *Jobst* language relied upon by the Secretary does not support distinctions *amongst* those who marry; rather, it explains the logic of distinguishing between those who marry and those who do not. Thus, even if the Secretary's leap of faith were correct, that *Jobst* validates all distinctions based on marriage, it would not support the distinction in this case: it cannot explain why remarriage for widows should have a different result than remarriage for surviving divorced spouses.

Reliance on *de Castro* is equally misplaced. This Court's approval of the disparate treatment of divorced wives was premised on a wife's need for extra benefits to assist in the care of a retired husband, a need which does not exist for the divorced wife. See 429 U.S. at 188. That reasoning has no relevance in the survivor situation, where there is no living spouse for whom additional benefits are needed. See J.S. App. 9a. *de Castro* does not provide a basis for distinguishing in every instance between the divorced and non-divorced, any more than *Jobst* automatically validates all distinctions based on marital status.

Furthermore, as with *Jobst*, the Secretary's broad application of limited language (Sec.Br. 24, quoting 429 U.S. at 188) ignores the legislative scheme at issue in this case. Congress expressly determined that, in *this* context, divorce was not a relevant consideration: the death of the wage earner eliminated any differences in dependency between divorced and non-divorced spouses. *de Castro* does not provide an explanation for repudiating that determination upon remarriage.

In this case, as in *Jobst*, there is no dispute about the legitimacy of the general rule which deprived remarrying survivors of their entitlement. The Secretary's task, as in *Jobst*, is to rationalize a limited exception to that rule: the authorization of benefits only to widows who remarry. Instead, the Secretary merely recites the general rule as the basis for not extending the exception to divorced widows who remarry. Unlike, in *Jobst*, the Secretary can offer no valid explanation for applying the exception to one classification, but not to another.

C. The Secretary can provide no reasoned basis for exempting only one classification of surviving spouses from the burden of the remarriage rule when Congress has already recognized the equivalence which exists after the death of the wage earner

1. The Secretary seizes on the district court's statement that "Congress decided to treat the two groups identically upon death of the primary wage earner" (J.S. App. 42a) as the linchpin of his attack. He devotes much of his argument to an effort to refute that analysis (Sec.Br. 25-28), apparently in the belief that, if the two classifications are not identical, Congress was free to treat them differently in every conceivable context. But this approach ignores a crucial premise of equal protection analysis: "Permissible discriminations between persons must bear a rational relationship to their *relevant* characteristics." *Zobel v. Williams*, 457 U.S. 55, 70 (1982) (Brennan, J., concurring) (emphasis in original); see also, *e.g., Hooper v. Bernalillo County Assessor*, *supra*, 105 S.Ct. at 2869 (in light of purpose of program, date of residence is not relevant factor for distinguishing amongst veterans). In this case, the relevant characteristics of widows and divorced widows require similar treatment upon remarriage.

Based on his explanation of the benefits available to divorced women (Sec.Br. 25-27), the Secretary argues that the district judge misunderstood the statutory scheme, with the result that "the entire premise of [his] constitutional ruling is mistaken." *Id.* at 25. There is no indication, however, that Judge Byrne misapprehended the scheme. That his decisions do not detail every development in survivor's benefits implies, if anything, only a recognition that the omitted aspects were not pertinent. More important,

neither appellees nor the district court have suggested that members of the two classifications were identical at all times and in every context. Congress defined the category of divorced women which it determined should be entitled to benefits, just as it also defined the categories of wives, widows, and others whom it judged should be entitled. Those definitions necessarily have some differences, but the differences do not validate all distinctions in treatment. The issue here is whether those whom Congress did define as entitled beneficiaries of the survivor's program could be distinguished on the basis of a factor unrelated to the recognized bases for their entitlement.

Furthermore, Congress' 1965 extension of partial benefits to widows who remarried (see Sec.Br. 27-28) demonstrates only that Congress discriminated against divorced women at that time as well. In 1977, it continued and exacerbated the disparate treatment. If anything, the 1965 action emphasizes the habitual assumption that divorced widows are properly subject to harsher treatment than their married counterparts.[10]

The district court's conclusion is accurate. When Congress bestowed full benefits on all spouses, divorced and not divorced, at the death of the wage earner, it recognized the equivalence of their positions. The same factor motivating survivor's benefits for widows—probable dependency—also motivated survivor's benefits for divorced widows. In short, Congress determined that the *relevant*

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[10]As in 1977, Congress did not offer any explanation in 1965 for its discrimination against divorced widows who remarry. See S.Rep. No. 404, *supra*, reprinted in [1965] U.S. Code Cong. & Admin. News 2047-2049.

characteristics of the two classifications were indistinguishable. Recognizing that, the district court correctly summarized the contradiction inherent in the denial of benefits to one classification at remarriage:

> "Congress would have to have had some logical reason to believe that widowed and surviving divorced spouses have the same degree of dependency at the time of the primary wage earner's demise, but that, on remarriage, surviving divorced spouses become less dependent than widows."

J.S. App. 42a. That inconsisteney remains unexplained by the Secretary.

2. In finally trying to offer at rationale for the scheme (Sec.Br. 29-31), the Secretary first suggests that, in light of fiscal concerns, Congress could reasonably move one step at a time. As the district judge recognized, however, "Congress must have a rational basis for each step it takes." J.S. App. 44a; see also *id.* at 29a. Thus, he noted that, in *Wilson*, *Jobst*, and *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), this Court had found an "independent rational basis" for its action. See also, *e.g.*, *Westcott*, 443 U.S. at 88-89; *Geduldig v. Aiello*, 417 U.S. 484, 495 (1974). A legislature's right to move gradually does not permit it to draw the line wherever it chooses or to legitimize its action as accomplishing what it set out to accomplish: "This Court still has an obligation to view the classificatory *system*, in an effort to determine whether the disparate treatment accorded the affected classes is arbitrary." *Logan*, 455 U.S. at 441 (Blackmun, J., separate plurality opinion) (emphasis in original; footnote omitted). If Congress were free to move one step at a time, without demonstrat-

ing the propriety of *that* move, equal protection review would indeed be toothless.[11]

The contention that Congress was motivated by fiscal concerns (Sec.Br. 29, 31) is unsupportable. The Secretary cites the district court's reference to the 1977 legislative history which suggested a $1.3 billion cost for eliminating the remarriage rule for all secondary beneficiaries. *Id.* at 29. But he neglects to note the more detailed legislative history (also cited by the district judge), which estimated the annual cost of extending benefits to three categories of remarrying survivors as less than $50 million and termed the long-range cost "negligible". J.S. App. 4a n.4, 35a n.5, citing S.Rep. No. 98-23, 98th Cong., 1st Sess. 17 (1983).

Even the $50 million figure is misleadingly high. The chart accompanying the Senate Report estimated the six-year cost of providing benefits to the three remarrying categories (of which surviving divorced spouses were one) as less than $100 million, an annual cost of under $17 million. S.Rep. No. 98-23, *supra*, at 17; see also *id.*, at 73-74. Since surviving divorced spouses account for only a portion of that figure, the amount attributable to them is lower still.[12]

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[11] *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) and *New Orleans v. Dukes*, 427 U.S. 297 (1976), cited by the Secretary (at 29-30) in support of his one-step-at-a-time argument, are not contrary to appellees' position. They confirm that a legislature may move gradually, but they also note a rational basis for the move that was made. See 449 U.S. at 466; 427 U.S. at 305.

[12] In 1976, of the 3,862,000 beneficiaries in the "widows and widowers" category, only 21,000 were surviving divorced wives. There were only 66,000 "remarried widows". Social Security

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The Social Security system is immense. From 1979 through 1983, its payments were over $675 *billion*. Social Security Administration, 48 *Social Security Bulletin* 11 (Nov. 1985), Table M-1, p. 25. If the annual cost of paying benefits to remarrying divorced surviving spouses had been even as high as $17 million (but see *supra*, at 28), that would represent only .01% of the system's average annual outlay. The amount at stake was negligible; as in *Jimenez*, "there is no evidence supporting the contention that [inclusion of the disfavored class] would significantly impair the federal Social Security trust fund. . . ." 417 U.S. at 633. Congress could not reasonably have been motivated by financial considerations.

The Secretary also posits that, "because the principal purpose of secondary benefits is to afford protection for the wage earner's family as a unit," Congress could conclude that widowed spouses "had a more substantial stake . . . in the distribution of survivor's benefits . . . after remarriage." Sec.Br. 30. The Secretary does not explain the reasoning by which the conclusion purportedly follows from the premise, and none is apparent. Congress had already decided that both classifications were dependent on the wage earner, thus warranting equal treatment as survivors. And there is no evidence indicating that re-

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Administration, *Social Security Bulletin, Annual Statistical Supplement, 1976*, Table 104, p. 150. These figures corroborate the Congressional statistics indicating the relative pittance which would have been paid to divorced widows who remarried. Moreover, in an affidavit filed in the district court after this appeal was taken, the Secretary estimated that the total amount owed to all class members is only $5.6 million. Affidavit of Jack Gallagher, ¶ 12 (June 17, 1985), filed in *Owens v. Heckler*, Nos. 83-2436, 84-154 (C.D.Cal.).

marriage by a widow alters her relationship to the wage earner differently than does remarriage by a divorced widow. Once having decided that divorce and death were not sufficient bases on which to treat a divorced widow differently, Congress could not reasonably conclude that remarriage would effect such a distinction.

In addition, the Secretary hypothesizes a rationale based on the allegedly different economic ties to the wage earner of widows and divorced spouses. Sec.Br. 30-31. Since alimony ceases at remarriage, he suggests, it was reasonable for Congress to stop survivor's benefits at that point. To begin with, the argument is based on pure speculation.[13] But, it also suffers from a fundamental fallacy in logic. Distinctions between widows and divorced spouses (rather than surviving divorced spouses) are neither at issue in this case, nor instructive in comprehending legislative motivation. Thus, Congress' alleged "reliance" on alimony as a guiding principle is meaningless; alimony terminates at the wage earner's death, while Social Security benefits for divorced spouses do not.[14]

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[13]A 1975 study showed that "only 14 percent of divorced women were awarded alimony and of this 14 percent only 46 percent were collecting regularly." National Commission on the Observance of International Women's Year, " . . . *To Form a More Perfect Union* . . ." 16 (1976). It would have been entirely unreasonable for Congress to premise its action on a factor which was only true for 6.4% of divorced women.

[14]Moreover, as the Secretary acknowledges (Sec.Br. 31), Congress eliminated proof of support, including alimony, as a condition for divorced spouse's benefits. See *supra*, at 3. Having determined that actual dependency was not a proper consideration in the award of survivor's benefits, Congress could not reasonably have concluded that that factor should be determinative at remarriage.

Principles of distribution drawn from situations involving living wage earners have no applicability in this situation, where both the favored and disfavored classifications are eligible precisely because the wage earner has died. Congress had already determined that there was no relevant distinction between the classifications at the death of the wage earner. The Secretary's reliance on concepts involving a living wage earner is grossly misplaced.

His strained hypothesis also has the ironic result of rewarding the widow who, he assumes, is still living off the wage earner's estate (Sec.Br. 31), while the divorced woman ultimately has neither the presumed estate nor survivor's benefits. Aside from its illogic, this conjecture perpetuates society's traditionally moralistic comparisons between divorced and married women. The widow is "entitled" to remarry; accordingly, she should retain survivor's benefits (as well as her first husband's estate). The "divorcee," however, should suffer if she has the temerity to remarry. Congress, so the Secretary maintains, could reasonably determine that divorced women should be punished for remarrying, while widows should be encouraged.

There is no reasonable basis on which to presume that survivors who did not divorce are more likely to be dependent on their deceased husbands when they remarry. If any distinction in dependency between survivors existed, it could only logically be recognized at the death of the wage earner, not upon the occurrence of an event which is unrelated to the relationship between the wage

earner and the survivor.[15] The Secretary is not free to offer questionable rationales for legislative action, when, in fact, Congress does not view the allegedly distinguishing characteristic as relevant.[16]

The Secretary's effort to devise a rationale suffers from another fatal weakness. Even if some marginal distinction between the classifications could be conjured up, the Secretary does not and cannot explain how this distinction could support differential treatment in light of the remarriage rule. Congress expessly stated its concern that remarriage should not be discouraged. That public policy is violated no less in denying benefits to divorced widows than to those who are not divorced. *Accord, Williams v. Vermont*, 105 S.Ct. 2465, 2472 (1985); *Zobel v. Williams*, 457 U.S. 55, 61 (1982); *Califano v. Westcott*, 443 U.S. 76, 86-87 (1979). No rationale can explain singling out one classification when the overriding policy is equally applicable to both:

> "The term 'rational' . . . includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose *that transcends the harm to the members of the disadvantaged class.*"

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[15]Indeed, as the district court noted, "[w]hatever dependency differences might exist between widowed spouses and surviving divorced spouses upon the death of the wage earner, *those differences would likely be erased by marriage.*" J.S.App. 42a (emphasis supplied).

[16]*Cf. Roe v. Wade*, 410 U.S. 113, 161-162 (1973) (state cannot defend criminal abortion statute on ground that fetus is human being when, in every other context, fetus is not recognized as person until birth).

City of Cleburne, 105 S.Ct. at 3261 (Stevens, J., concurring) (emphasis added; footnote omitted). Given Congress' clearly stated goal, the Secretary's reliance on vague and speculative concepts cannot be accorded serious consideration.

3. The Secretary has devised several explanations after the fact for this discrimination. But the government's "rationale must be something more than the exercise of a strained imagination; while the connection between means and ends need not be precise, it, at the least, must have some objective basis." *Logan*, 455 U.S. at 442 (Blackmun, J., separate plurality opinion). The purpose of survivor's benefits for both divorced and non-divorced widows and the policy of not discouraging remarriage have been clearly articulated. Where the legislature's overall goal is apparent, and the only explanation for a discriminatory exception to that goal rests on flimsy and unsupportable speculation, it is illogical to rely on the latter. See, *e.g.*, *Wiesenfeld*, 420 U.S. at 648 & n.16.

No reasoned basis exists for distinguishing amongst surviving spouses at remarriage. The discriminatory scheme was merely an expedient political compromise, and, in all likelihood, an unthinking and traditional response based on archaic prejudices against divorced women. The district court thus correctly concluded that no valid rationale supported the discrimination.

II. CLASS CERTIFICATION SHOULD NOT BE GOVERNED BY AN IMPRACTICAL AND UNNECESSARILY RESTRICTIVE READING OF SECTION 405(g)

A. The district court correctly concluded that the Secretary waived exhaustion

The district court held that further exhaustion of administrative remedies was not necessary because, "under the Secretary's own regulations, the exhaustion requirement is waived." J.S. App. 18a. Those regulations provide a mechanism by which the Secretary waives further exhaustion if the issue raised is solely constitutional. 20 C.F.R. §§ 404.923 - 404.928. Both Buenta Owens and Kenneth Owens secured agreements from the Secretary waiving further exhaustion and conceding that "[t]he sole issue in dispute is the application of [the challenged] sections . . . of the Social Security Act." J.S. App. 50a, 52a. The Secretary contends, however, that, despite his formal acknowledgement of the futility of further exhaustion, membership in the class required each individual also to obtain a formal waiver. Under the Secretary's reasoning, this holds true even though all class members raised only the issue of the constitutionality of the statutory scheme.

On three occasions, this Court has been faced with jurisdictional questions in cases where the plaintiffs challenged the constitutionality of a provision of the Social Security Act. *Califano v. Goldfarb, supra; Mathews v. Diaz*, 426 U.S. 67 (1976); *Weinberger v. Salfi*, 422 U.S. 749 (1975). In each instance, the Court concluded that, as a practical matter, the Secretary had waived further exhaustion. Because the Secretary is not competent to address constitutional challenges, the Court recognized that

"further exhaustion would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest." *Salfi*, 422 U.S. at 765-766.

In each case, this Court carefully scrutinized the Secretary's actions in order to ascertain his true position. In *Salfi*, it focused upon the Secretary's decision not to

> "raise any challenge to the sufficiency of the allegations of exhaustion in appellees' complaint, . . . interpret[ing] this to be a determination by him that for purposes of this litigation the reconsideration determination is 'final.'"

Id. at 767.

Similarly, in *Diaz*, the Court reviewed the Secretary's recognition that the plaintiff's applications "raised no disputed issues of fact and therefore the interlocutory denials of their applications should be treated as final for the purpose of this litigation;" this was considered sufficient to satisfy the requirements of 42 U.S.C. § 405(g). 426 U.S. at 72-73; see also *id.* at 76-77. Even though the Secretary had moved to dismiss the complaint for failing to exhaust administrative remedies, the Court viewed his overall posture as a waiver of exhaustion. *Id.* at 72.[17]

In *Goldfarb*, the plurality[18] cited the improbability of the existence of facts which would alter the solely consti-

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[17]The *Diaz* analysis was recently reaffirmed in *Heckler v. Ringer*, 104 S.Ct. 2013, 2024 n.11 (1984), where the Court noted the special circumstances inherent in purely constitutional challenges under § 405(g).

[18]By concurring in the judgment, Justice Stevens implicitly agreed that the district court had correctly exercised jurisdiction over the claim pursuant to § 405(g). 430 U.S. at 217 (Stevens, J., concurring in the judgment).

tutional nature of the challenge. The Secretary had stated that the denial of the application was based upon the failure to meet the requirements of the challenged provision. That recognition formed a sufficient basis to conclude that exhaustion had been waived. 430 U.S. at 203 n.3.[19]

In all three cases, the Secretary lacked the power to address the challenge even if he was so inclined, but this fact, by itself, was not the basis for finding further exhaustion futile. Exhaustion was still required as long as there was a realistic possibility that the claim might be decided on another issue. *Salfi*, 422 U.S. at 765. But, once the Secretary had conceded that the claim over which he lacked competence was controlling, further exhaustion was futile. This was true whether the Secretary's concession occurred during the administrative proceedings, as in *Goldfarb*, or in court, as in *Salfi* and *Diaz*. Accordingly, even though the facts fell "short of meeting the literal requirement of § 405(g)," exhaustion was not viewed as a precondition to the exercise of the court's jurisdiction. *Salfi*, 422 U.S. at 765.

This reasoning is equally applicable here. The Secretary explicitly decided to utilize his expedited appeals process. Pursuant to this procedure, the claimant need not exhaust administrative remedies beyond the reconsideration stage

> "when the facts and [the Secretary's] interpretation of the law are not in dispute and when the only factor

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[19]See also *Wright* v. *Califano*, 603 F.2d 666, 667, 669 & n.9 (7th Cir. 1979), cert. denied, 447 U.S. 911 (1980).

> precluding an award of benefits is a statutory provision which the claimant challenges as unconstitutional . . . ."

Heckler v. Ringer, 104 S.Ct. 2013, 2017 n.2 (1984). The Secretary's decision to utilize the expedited appeals procedure was a concession that the only issue raised in this action is a constitutional one, beyond the scope of his powers to address. See, *e.g.*, *Wiesenfeld*, 420 U.S. at 641 n.8. That recognition is applicable both to the named plaintiffs and to the plaintiff class.[20]

The Secretary argues that individual class members may present other factual issues which would be dispositive of their cases. In this Court, he speculates that the duration of the marriage or the date of the remarriage might differ from that recognized by the parties. Sec.Br. 41. In the district court, he raised a variant of these hypotheticals, claiming that an applicant might change her mind as to whether there had actually been a remarriage. J.S. App. 17a n.4. The district court dismissed this possibility as "speculative and unlikely." *Ibid.*

More important, however, is that the class only includes individuals who "would be eligible for benefits *but for the operation of the remarriage rule*. The facts of their claims are not in dispute. . . ." J.S. App. 17a (footnote omitted; emphasis added). The alleged factual issues

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[20]Like § 405(g) itself, the Secretary's regulations are written in terms of individual claimants and do not address classes or how principles articulated in terms of individuals are to be applied to classes. Thus, when the Secretary published the regulation governing expedited appeals, no mention was made of its relevance to class actions. 40 Fed.Reg. 53385 *et seq.* (1975). This Court has recognized, however, that use of the singular in § 405(g) is not relevant to the propriety of class certification. *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979).

raised by the Secretary in this Court have already been eliminated as grounds for the denial of benefits.

The Secretary's concession in this case is more formal and specific than the events on which this Court relied in *Salfi*, *Diaz*, and *Goldfarb* to conclude that the Secretary had waived exhaustion. In *Salfi*, the Court interpreted his failure to challenge the complaint's allegations on exhaustion as a statement of finality. In *Diaz*, despite the Secretary's motion to dismiss, the Court extrapolated from his oral admission that the decisions should be treated as final. In *Goldfarb*, the Secretary's reliance on the challenged provision, in the initial notice, was a sufficient basis to construe finality. In each case, this Court interpreted the Secretary's action to determine whether he had in fact waived exhaustion.

Applying that logic here produces the same result. Despite the Secretary's protestations, he has stated from the first[21] that the appellees failed to satisfy the terms of the statute and that the sole issue is the constitutionality of the challenged provisions. Further, he concedes that the district court "properly exercised jurisdiction . . . and reached the merits of the constitutional question" with regard to the claims of the named plaintiffs. Sec.Br. 33. Given these acknowledgements, the Secretary's waiver should be interpreted as applicable to all other similarly situated individuals. To do otherwise would be to ignore "the intensely 'practical' approach which the Court has

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[21]In the appellees' initial decisions, the Secretary relied on their inability to comply with the statute (*i.e.*, they had remarried) as the basis for denial. See B.R. 7, 12; K.R. 15, 31, 48. Each class member, by definition, received a similar denial.

adopted" in the exhaustion area. *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976) (citation omitted).[22]

B. The district court properly held that the 60-day period in §405(g) is a statute of limitations and that, in the circumstances of this case, the class should not be defined by reference to the date on which the complaint was filed

1. This Court has twice held that the 60-day period in § 405(g) is "a statute of limitations," and, accordingly, is "waivable by the parties." *Salfi*, 422 U.S. at 764; *Eldridge*, 424 U.S. at 328 n.9. This position is generally recognized and followed by the Courts of Appeals.[23] Even

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[22]The district court's alternative analysis was also correct: "[I]n the circumstances of this case, the exhaustion requirement may be waived by the Court." J.S. App. 18a. A court may determine that "a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." *Mathews v. Eldridge, supra*, 424 U.S. at 330. As this Court indicated in *Eldridge*, the rationale for judicial waiver of exhaustion derives from the principles articulated in *Salfi* for waiver by the Secretary. Waiver is thus appropriate where "[i]t is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context." *Ibid.* In this situation, it is impossible, not merely unlikely, that the Secretary would alter the controlling requirement, so that the same logic applies. The district court correctly followed that commonsensical analysis. J.S. App. 18a-19a.

[23]See, e.g., *City of New York v. Heckler*, 742 F.2d 729, 737 (2d Cir. 1984), cert. granted, No. 84-1923 (Oct. 7, 1985); *Jimenez v. Weinberger*, 523 F.2d 689, 696-697 (7th Cir. 1975), cert. denied *sub nom. Mathews v. Jimenez*, 427 U.S. 912 (1976); *Wright v. Califano*, 603 F.2d 666, 669 n.8 (7th Cir. 1979), cert. denied, 447 U.S. 911 (1980); *Johnson v. Heckler*, 769 F.2d 1202, 1209, rehearing denied, 776 F.2d 166 (7th Cir. 1985); *Mental Health*

(Continued on following page)

the two circuits which have described the 60-day period as "jurisdictional" have identified circumstances where it is not applicable.[24]

The district court held that the 60-day limitation, "like all statutes of limitations, . . . is subject to tolling." J.S. App. 21a. Thus, it is "tolled for at least 60 days, prior to the filing of Mrs. Owens' complaint in this action." J.S. App. 21a. The Secretary does not challenge this application of tolling. See *Heckler v. Lopez*, 104 S.Ct. 221, 224 n. 4 (1983) (Stevens, J., dissenting in part). The district judge also held that the 60-day period may be tolled where "the filing of a single administrative complaint gives the defendant adequate notice of the nature of the claim and opportunity to evaluate the effects of the claim on all similarly situated persons." *Id.* at 22a. The court found that Mrs. Owens' request for reconsideration provided the Secretary with notice of the constitutional claim, so that the 60-day period was tolled as of the date of the reconsideration request. *Ibid.*

The Secretary does object to tolling the statute at this earlier date, however, contending that the 60-day language establishes an absolute prohibition against a court exercising jurisdiction where there has not been literal compliance. In the district court (but not on appeal), the

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Association of Minnesota v. *Heckler*, 720 F.2d 965, 973 n.19 (8th Cir. 1983); *Lopez* v. *Heckler*, 725 F.2d 1489, 1508 (9th Cir.), vacated on other grounds, 105 S.Ct. 583 (1984); *Hatchell* v. *Heckler*, 708 F.2d 578, 580 n.1 (11th Cir. 1983). But see *Hyatt* v. *Heckler*, 757 F.2d 1455, 1460-1461 (4th Cir. 1985), petition for cert. pending, No. 85-474; *Biron* v. *Harris*, 668 F.2d 259, 261 (6th Cir. 1982).

[24]*Parker* v. *Califano*, 644 F.2d 1199 (6th Cir. 1981); *Shrader* v. *Harris*, 631 F.2d 297 (4th Cir. 1980).

Secretary argued with equal vigor that §405(g)'s venue requirement is "jurisdictional," therefore barring certification of a class which included members who resided outside the Central District of California. See J.S. App. 22a. The district court properly rejected this argument, relying on the same discussion in *Salfi* in which this Court concluded that both the 60-day rule and the venue requirement were not jurisdictional. 422 U.S. at 764. It also pointed to *Califano v. Yamasaki*, 442 U.S. 682, 698-704 (1979) (see J.S. App. 22a-23a), which approved of nationwide class actions under §405(g) and thus repudiated strict adherence to the language of the venue provision.

This Court has thus declined to employ a literal reading of either the exhaustion requirement, see *Salfi*, 422 U.S. at 765, or the venue rule. Just as these aspects of §405(g) need not be slavishly followed in every context, so too must the 60-day rule be interpreted and applied in a manner commensurate with the statutory scheme and the particular circumstances: "the sense of the statute" must control, so that the Court may move "towards the commonsense view. . . ." *Heckler v. Edwards*, 104 S.Ct. 1532, 1538 (1984). Where the issue is class membership, it is especially appropriate not to apply meaningless criteria, for the only result will be artificial restrictions on those who may obtain relief. If, as it appears, "class relief for claims such as those presented . . . in this case is peculiarly appropriate," *Yamasaki*, 442 U.S. at 701, then the Court should analyze the 60-day rule with the same deference to practicality which it has employed with the exhaustion and venue requirements.

Furthermore, while the "sparse" legislative history indicates that §405(g) was written to address "run-of-the

mill'' claims,[25] this Court has recognized that Congress never intended the preclusion of broader, more flexible review. Thus, in *Yamasaki*, the Court rejected the Secretary's contention that the appellate courts which had held that class relief was available under §405(g) ''evinced insufficient respect for the statute's plain language. . . .'' 442 U.S. at 699. Instead, it observed that §405(g) presented no special considerations, for the provision

> ''contains no express limitation of class relief. It prescribes that judicial review shall be by the usual type of 'civil action' brought routinely in district court in connection with the array of civil litigation.''

Id. at 699-700.

The Court likewise held that §405(g) was no bar to injunctive relief. Calling the ''Secretary's reading of the statute . . . too grudging,'' it concluded that nothing in the language or legislative history of §405(g) precluded injunctive relief: ''Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction.'' *Yamasaki*, 442 U.S. at 705.

Similarly, in *Salfi*, while observing that §405(g) ''prescribes typical requirements for review of matters before an administrative agency,'' 422 U.S. at 757-758 (footnote omitted), the Court held that it should be read broadly to permit review of constitutional challenges, which the Secretary is incompetent to handle. In reaching this conclusion, the Court focused on the importance of providing

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[25] *Yamasaki*, 442 U.S. at 699 n.13; *Salfi*, 422 U.S. at 792 n.8 (Brennan, J., dissenting); see also *Kennedy v. Harris*, 87 F.R.D. 372, 376-377 (S.D.Cal. 1980).

an adequate judicial forum for the consideration of constitutional claims. *Id.* at 762; see also *Califano v. Sanders*, 430 U.S. 99, 109 (1977).

The district court's ruling is also consistent with the language of §405(g), which expressly authorizes the Secretary to waive the time limit for filing an action in federal court. The claimant obtains review "by a civil action commenced within sixty days after the mailing to him of notice of such decision *or within such further time as the Secretary may allow.*" 42 U.S.C. §405(g) (emphasis added). The italicized phrase demonstrates Congress' intent that the limitations period should be applied with sufficient flexibility to allow for equitable considerations.[26]

Section 405(g) has thus been interpreted to accommodate both the simple, individual case and also class-wide challenges. Since this Court recognizes that common principles of equity and civil procedure are applicable in the §405(g) context, the 60-day limitation must be subject to a court's equitable power to toll or waive.

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[26]The regulations fleshing out this provision reflect the flexibility inherent in the 60-day rule. The Secretary lists factors which are considered in determining whether the individual "had good cause for missing the deadline," so that "the time period will be extended." 20 C.F.R. § 404.982; see also *id.*, § 404.911(a). "Examples of circumstances where good cause may exist" include "[u]nusual or unavoidable circumstances . . . which show that you could not have known of the need to file timely. . . ." 20 C.F.R. § 404.911(b)(9). The average claimant, faced with a decision stating that the statute does not authorize benefits for people in her circumstances (e.g., she has remarried), would not reasonably assume that she should act within sixty days. In a case of constitutional proportions, it is unlikely that most people would even discover the existence of a potential claim within sixty days.

2. A statutory time limit does "not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 559 (1974). Thus, when reviewing statutes of limitations, this Court has analyzed the limitation in light of the purposes underlying the overall statutory scheme.

In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), it rejected the argument that the time limit for filing a charge under Title VII of the Civil Rights Act of 1964 was a jurisdictional prerequisite to filing suit in district court. The Court noted that one Senator had characterized the filing rule as a "period of limitations," and another "described its purpose as preventing the pressing of 'stale' claims, . . . the end served by a statute of limitations." *Id.* at 394. In light of the similar nature of §405(g), this analysis is especially significant:

> "Declining to read literally another filing provision of Title VII, we explained that *a technical reading would be 'particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.'* "

Id. at 397 (citation omitted; emphasis added). By holding that the filing rule was "subject to waiver as well as tolling when equity so requires," the Court "honor[ed] the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer." *Id.* at 398.[27]

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[27]See also *Baldwin County Welcome Center v. Brown*, 104 S.Ct. 1723, 1725-1726 & n.6 (1984) and *id.* at 1731 (Stevens, J., dissenting) (90-day rule for filing under Title VII is statute of limitations so that filing and waiver would be applicable in appropriate circumstances).

Similarly, in *Honda v. Clark*, 386 U.S. 484 (1967), the Court held that a 60-day limitation for seeking judicial review of the Attorney General's decision under the Trading with the Enemy Act was a statute of limitations subject to equitable tolling. The statute was tolled during the pendency of litigation filed by other individuals who were not parties to the *Honda* case. The Court expressly relied on the Act's remedial purpose ("to provide a method for the fair and equitable distribution of vested enemy assets to American residents") as the basis for an observation particularly appropriate to the instant case: "The 60-day limitation on suits was designed to further this end—to aid claimants by expediting a final distribution—and *not primarily as a shield for the Government.*" *Id.* at 495-496 (emphasis added).

The similar remedial purposes of the Social Security Act have long been recognized: "The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near." *Helvering v. Davis*, 301 U.S. 619, 641 (1937); see also *Flemming v. Nestor*, 363 U.S. 603, 610 (1960); *Social Security Board v. Nierotko*, 327 U.S. 358, 364 (1946). But many Social Security beneficiaries and applicants are ill-suited to recognize and protect their rights under the Act.[28] The Secretary

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[28]See, e.g., *Heckler* v. *Campbell*, 103 S.Ct. 1952, 1961 (1983) (Marshall, J., concurring in part, dissenting in part); *City of New York* v. *Heckler*, *supra*, 742 F.2d at 738; *Tierney* v. *Schweiker*, 718 F.2d 449, 455-456 (D.C.Cir. 1983); *Penner* v. *Schweiker*, 701 F.2d 256, 261 (3d Cir. 1983); *Parker* v. *Califano*, 644 F.2d 1199, 1203 (6th Cir. 1981); *Gray Panthers* v. *Schweiker*, 652 F.2d 146, 169 (D.C.Cir. 1980).

himself, in reference to the Supplemental Security Income (SSI) program, has expressly observed the relatively low educational level of most recipients. 46 Fed. Reg. 42337, 42338 (1981).[29] Thus, as in *Zipes*, when the Secretary has been notified of the claim and the plaintiff represents a class of individuals who, without the assistance of counsel, are unlikely to recognize the existence of a constitutional issue in the denial of their applications, the statute of limitations should be applied flexibly in order to accommodate the interests of both the Secretary and the Act's intended beneficiaries.

In cases where the only issue is the constitutionality of the statute and the Secretary's basis for denial of benefits is the conflict between the recognized facts and the statute itself, principles of equity and common sense require a practical approach to the question of class certification. Without such an approach, class certification in a constitutional challenge to the Social Security Act will frequently be precluded. When the Secretary's policy of "nonacquiescence" is added to the equation, the inevitable result is that only named plaintiffs will obtain relief from a constitutional deprivation, a harm which exists separately and independently from any economic injury. *Heckler v. Mathews*, 104 S.Ct. 1387, 1395 (1984); see also J.S. App. 26a. For § 405(g) to have any practical import

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[29]While the instant case addresses an issue in the insurance program, § 405(g) is also applicable to claims under SSI (see 42 U.S.C. § 1383(c)(3)), the means-tested program which provides benefits to low income aged, blind, and disabled individuals. 42 U.S.C. § 1381 *et seq.* Because of the low amount of their benefits, many Social Security recipients are also eligible to receive an SSI payment.

in constitutional challenges, it must be interpreted realistically to permit those harmed to obtain redress. The district court's focus on the reconsideration decision effected this goal, and it should therefore be upheld.[30]

CONCLUSION

The judgment of the district court should be affirmed on the merits. On the issue of class certification, the Secretary's appeal should be rejected, with the judgment affirmed to the effect that the class definition was not inconsistent with 42 U.S.C. § 405(g).

Respectfully submitted,

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[30]This Court has taken no action on appellees' cross-appeal, which seeks to define the class more broadly than did the district court. See *Owens* v. *Heckler*, No. 85-31 (docketed July 5, 1985), at 10-12. By arguing in the instant appeal that the district court's order of class certification does not conflict with § 405(g), appellees do not foreclose their right, at the appropriate time and in the appropriate forum, to contest the class definition as too restrictive. That issue, however, is not before the Court on this appeal.